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Opinion Committee Opinion Committee
RANDALL COUNTY TEXAS

COUNTY SQUARE NORTH
CANYON

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JOELLA R. McPHERSON, C.P.A.
COUNTY AUDITOR
(806) 655-6260

August 10, 1993

400 16TH STREET
CANYON, TEXAS 79015

FILE # ~~RG-00574-DM~~
~~ME-21766-92~~

General Dan Morales
Attorney General
Courts Bldg.
P. O. Box 12548, Capitol Station
Austin, Texas 78711

I.D.# 21766

RQ-599

Re: County's authority to regulate, as a "sexually oriented business," a nightclub existing when the regulations are adopted, where topless or nude dancers perform

Dear Attorney General Morales:

The Randall County Commissioners Court is considering a comprehensive order for the regulation of sexually oriented businesses. Principal features of the proposed regulations are spacing restrictions mandating that such establishments be located at least 1000 feet from other sexually oriented businesses, churches, schools, child-care facilities, residential areas and public parks, and a licensing requirement which will involve the applicant's payment of fees and screening for convictions of enumerated felony offenses.

The major concern in promulgating the regulations is ascertaining the legal limits in their scope. Of specific concern, respecting which I ask your guidance, are two issues:

(1) can the definition of "sexually oriented business" in the Commissioners Court order encompass an adult cabaret or establishment featuring topless or nude dancing performances?

(2) Can the order for the regulation of sexually oriented businesses, particularly the spacing and license requirements, be enforced retroactively to businesses operating at the time the order is adopted?

The troublesome aspect of the first issue is that the definitional portion of the local government code provisions empowering county regulation does not enumerate an adult cabaret or club with nude or topless dancers or employees as a sexually oriented business. *See*, Texas Local Government Code Ann §243.002 (Vernon Supp. 1993). Similarly, the second issue flows from the statute's silence on whether regulations adopted can be made retrospective.

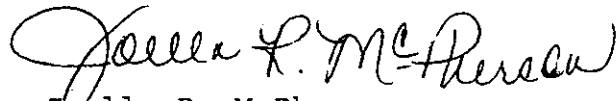
In a legal memorandum the Randall County Criminal District Attorney's office has opined in the affirmative to both inquiries. According to its view, the case authority implicitly or indirectly sets adult cabarets or nude/topless dancing establishment within the permissible purview of county sexually oriented business regulation. That office further points to case holdings which by analogy would allow the County in exercise of its police power to require the relocation of a preexisting business to comply with newly adopted spacing requirements, provided the owner is given reasonable time to recover his investment in the existing location. I have enclosed a copy of the district attorney's office's memorandum.

Given the problematic state of the law, however, an opinion from your office on the issues enumerated above would be of immense value. A clear need exists for the regulation of these businesses,

and it is desired that the regulations be broad enough to meaningfully address the social evils identifiable with them. Still, with ill-defined boundaries in the statutes and case authorities, the drafting of the regulations must be handled delicately, after reasoned deliberation. I have reservations about the collecting of fees and other implementation of regulations whose enforcement could subject the County to costly litigation and exposure in damages.

I would greatly appreciate your advice on the two issues identified above. If any further background information would be useful, please do not hesitate to contact me.

Very truly yours,

A handwritten signature in cursive script, reading "Joella R. McPherson". The signature is written in dark ink and is positioned above the printed name and title.

Joella R. McPherson
Randall County Auditor